To: Subcommittee on Artificial Intelligence and Unauthorized Practice of Law
From: Judge Wendy Chang
Date: January 7, 2019
Re: Unauthorized Practice of Law

1. What constitutes the practice of law in California?

Section 6125 of the State Bar Act states:

> No person shall practice law in California unless the person is an active member of the State Bar.

(Business & Professions Code §6125); Cal. Rule Prof. Conduct Rule 5.5(b). State Bar members are also prohibited from aiding or abetting any person or entity in the unauthorized practice of law. Cal. Rule Prof. Conduct Rule 5.5(b); Geibel v. State Bar (1938) 11 Cal.2d 412, 419-423.

The State Bar Act, however, does not define "practice of law". In *Birbower, Montalbano, Condon & Frank v. Sup. Crt.* (1998) 17 Cal.4th 119, the California Supreme Court reaffirmed the long standing definition of the practice of law as ""the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.'" *Id.* at 128 (*quoting People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535). The *Birbower* court went on to note that the *Merchants* definition included "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation," *Id.*, and then cited with approval *People v. Ring* (1937) 26 Cal. App. 2d Supp. 768, 771-772 (noting that the fact that the State Bar Act was adopted by the Legislature in 1927 using the term "practice of law" without defining it evidenced the "obvious and inescapable" conclusion that "in doing so, it accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court that it had a sufficiently definite meaning to need no further definition. The definition above quoted from *People v. Merchants Protective Corp.* has been approved and accepted in the subsequent California decisions [citations], and must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term 'practice of law'".

2a. What conduct is prohibited in California as the unauthorized practice of law?

The performance of the following acts by a person who was not an active member of the State Bar of California would be unauthorized practice of law in California:

1) Appearing in a court of justice
    a. Physical appearances in court
    b. Appearances on pleadings filed in court
    c. Signing of pleadings filed in court
    d. Depositions taken in pending litigation
2) Giving legal advice
3) Drafting legal instruments
4) Holding oneself out as an attorney

5) Negotiating and settling claims on behalf of another

6) Serving as a private arbitrator, mediator or other dispute resolution neutral

Merchants, supra, 189 Cal. At 535; Vapnek, Tuft, Peck and Wiener, *California Practice Guide, Professional Responsibility* (The Rutter Guide 2017) at 1:181 et seq. and citations contained therein.

Due to the language of §6125 being drafted in terms of a "person", California law only permits a non-attorney natural person to represent themselves before a Court. *Roddis v. Strong* (1967) 250 Cal. App. 2d 304, 311. An entity, on the other hand, must be represented by a lawyer and may not represent itself (either directly or through a non-lawyer agent) in litigation, as such an act would be the unauthorized practice of law. *See e.g. Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101) (corporation); *Albion River Watershed Protection Ass'n v. Department of Forestry & Fire Protection* (1993) 20 Cal. App. 4th 34, 37 (unincorporated association); *Aulisio v. Bancroft* (2014) 230 Cal. App. 4th 1518, 1519-20 (trustee for trust).

Out of state law firms must register with the State Bar of California to be eligible to practice law in California. Business and Professions Code sections 6174 and 6174.5 (limited liability partnerships); Business and Professions Code sections 6160 (law corporations).

2b. <u>In addition, what are the penalties or consequences for unlawful practice in California?</u>

For the UPL perpetrator, potential consequences for engaging in UPL can include:

1) Criminal penalties. Business & Professions Code §6126 (misdemeanor that could result in jail time).

2) Monetary awards connected with criminal prosecutions. Business & Professions Code §6126.6.

3) Contempt of Court. Business & Professions Code §6127.

4) Civil lawsuits. UPL can also result in civil lawsuits for equitable relief under the unfair competition law of Business & Professions Code §17200 and civil damages under tort theories, *Olson v. Cohen* (2003) 106 Cal. App. 4th 1209, including potential punitive damages.

5) The inability to recover fees. *Birbower, supra,* 17 Cal.4th at 140.

6) Imposition of sanctions. *Albion River Watershed Protection Ass'n v. Department of Forestry & Fire Protection* (1993) 20 Cal. App. 4th 34, 37

<u>For those affected by UPL, potential consequences can include:</u>

1) Nullification of civil judgments obtained against a party represented by an unlicensed person. *Russell v. Dopp* (1995) 36 Cal. App. 4th 765, 775.

2) The overturning of criminal conviction of defendant represented by unlicensed person, as a deprivation of the defendant's constitutional right to counsel. *In re Johnson* (1992) 1Cal.4th 689, 700-701.

3. <u>What practice of law conduct is permitted for persons who are not State Bar licensees</u>?

a. Exceptions to §6125:

Notwithstanding the broad language of Business & Professions Code §6125, California law recognizes limited exceptions to §6125's prohibition, allowing unlicensed persons to practice law in California under "narrowly drawn"[1] circumstances:

1) By Consent of the Trial Judge. *In re McCue* (1930) 211 Cal. 57, 67.
2) Pro Hac Vice. Cal. Rules of Court, rule 9.40.
3) Appearance by military counsel. Cal. Rules of Court, rule 9.41.
4) Certified law students. Cal. Rules of Court, rule 9.42.
5) Out-of-State Attorney Arbitration counsel. Cal. Rules of Court, rule 9.43.
6) Registered Foreign Legal Consultant. Cal. Rules of Court, rule 9.44.
7) Registered Legal Services Attorneys. Cal. Rules of Court, rule 9.45.
8) Registered In-House Counsel. Cal. Rules of Court, rule 9.46.
9) Attorneys Practicing Temporarily in California as part of litigation. Cal. Rules of Court, rule 9.47.
10) Non-litigating attorneys temporarily in California to provide legal services. Cal. Rules of Court Rule. 9.48.

See also Comment to Cal. Rules Prof. Conduct Rule 5.5.

b. Actions Not Considered the "Practice of Law" Under California Law

Certain other acts have been legally deemed to not constitute the "practice of law" in California:

1) "How to" books – so long as they are instructional and addressed to the public in general, as opposed to addressing any specific legal problem of a specific person. *People v. Landlords Professional Services* (1989) 215 Cal. App. 3d 1599, 1606.
2) Legal forms. *Id.* at 1605-06.
3) Filling in forms at the direction of clients. *Id.; Matter of Valinoti* (Rev. Dept. 2002) 4 Cal. State Bar Crt. Rptr. 498, 519.
    a. Non-lawyer filling in form without direction of clients is UPL. *Brockey v. Moore* (2003) 107 Cal. App. 4th 86. 97. But compare:
    b. Non-lawyer selection form to be used by client for client may be UPL. *People v. Sipper* (1943) 61 Cal. App. 2d Supp. 844, 847 (disapproved on other grounds in *Murgia v. Mun. Ct.* (1975) 15 Cal.3d 286, 301).
4) Acting as mere scrivener. *Id.*
5) Acting as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator, or in any similar capacity for a court or any other governmental agency, so long as the individual does not give legal advice, examine the law or hold themselves out as being entitled to practice law. State Bar Rule 2.30(B), (C).

[1] *Birbower, supra,* 17 Cal.4th at 130.

6) Non-lawyer operating a collection agency collecting a debt on its own behalf. *Le Doux v. Credit Research Corp.* (1975) 52 Cal. App. 3d 451, 454-55. (*disbarred or suspended attorneys excluded. Business & Professions Code §6130).

7) Preparation of simple tax returns. *Agran v. Shapiro* (1954) 127 Cal. App. 2d Supp. 807, 813.

8) Qualifying legal document assistants and unlawful detainer assistants registered under Business & Professions Code §6401.5 (*disbarred or suspended attorneys excluded. Business & Professions Code §6402).

9) Qualifying paralegals under the supervision of a State Bar member or an attorney practicing law in federal courts located in California by the attorney to him or her. Business & Professions Code §6450 et seq.)

10) Insurance company employing captive law firm(s) is not engaging in UPL. *Gafcon Inc. v Ponsor & Assoc.* (2002) 98 Cal. App. 4th 1388, 1405.

11) Immigration services. 8 CFR §§1.1, 292.1; Business & Professions Code §22440 et seq.; Government Code §8223.

12) Bankruptcy petition preparers who merely type bankruptcy forms. 11 USC §110(a); *In re Reynoso* (9th Cir. 2007) 477 F.3d 1117, 1123.

See Vapnek, Tuft, Peck and Wiener, California Practice Guide, Professional Responsibility (The Rutter Guide 2017) at 1:215 et seq. and citations contained therein.

4. What are the relevant California rules and laws restricting practice of law conduct?

Please see discussion above.

From: Daniel Rubins
Date: January 6, 2019
Re: Artificial Intelligence

I would really like to see the extension of some of the protective traditions and ethical standards that the legal profession has developed over the centuries. With respect to technologies like end-to-end encryption, I believe this is increasingly important. We all know that, with extremely narrow exceptions, lawyers cannot be compelled to divulge client secrets. However, software companies certainly can be compelled, as we learned with the use of the 1789 All Writs Act to compel Apple to unlock the San Bernadino shooter's phone for the FBI.

Legal tech is now a frontier for these issues. Amazon was compelled to hand over recordings from an Echo device in an Arkansas murder case last year. There is also a *now-debunked* but illustrative anecdote of an alleged killer asking Siri about where to hide his roommate's body. It's not hard to imagine in the future that investigators would want to retrieve a copy of the inputs to a legal algorithm that might be considered practice of law in a human context. We are a mere software update away from this reality.

We at Legal Robot have explored building an Alexa skill that would answer questions like "Alexa, ask Legal Robot to explain the latest changes to Yahoo's terms of service" or "Alexa, ask Legal Robot to send John Doe an NDA" or ask a Google Home device "Hey Google, ask Legal Robot to analyze Giant Megacorp's contract against our previous agreements." We have been careful to design these tools as

far from UPL as we can. Rather, we envision them more as consumer information or sales enablement tools, instead of legal tools. However, they are clearly in the UPL grey area, so we have held back these potentially useful tools because we do not have regulatory certainty. Other companies have been more daring: there are several chatbots that will file a patent or trademark registration for you (PatentBot), others that fill out and file immigration paperwork (VisaBot), file a small claims lawsuit (DoNotPay), or provide guidance on a workers compensation claim (LawDroid/PatBot). While I am not a lawyer, I all but assume the inputs to these tools are currently discoverable.

More serious than many issues raised by chatbots is the broader issue of encryption and privacy. Just last month the Australian parliament passed a sweeping bill that weakens encryption in the interest of national security. While it has not been tested in court, they can now compel a software developer to add an encryption backdoor and gag them from telling anyone else, even their superiors at the same company. The UK surveillance agency, GCHQ, has been publicly pushing for similar powers for over a year and there is consensus in the InfoSec community that other "Five Eyes" countries (Australia, Canada, New Zealand, the United Kingdom, and the United States) will soon propose similar laws. There are extremely good arguments on both sides of this debate and the issue is far from resolved. As we discuss how to bring technology companies into the fold of legal ethics, I think it is important to think of how long-standing protections available to consumers of legal services by way of privilege will be eroded by the use of technology. Without some kind of ethical requirement and legal mechanism for technology companies to resist overly broad instruments like National Security Letters or Australia's misguided encryption-backdoor-gag-order, I would be extremely cautious about providing any inputs to algorithms serving in place of lawyers.

There are ways to design around these constraints, but they require some extra effort from developers and forethought from regulators. Design patterns like functional end-to-end encryption (i.e. no "law enforcement backdoor") and privacy-by-design approaches to systems engineering provide a middle path. I hope we will recommend a regulatory mechanism that allows the Bar to sign off on systems that implement these principles to provide similar protections to consumers of legal algorithms as consumers of human legal services have enjoyed for centuries.

Ideally, as a legal tech company, I would like to see a regulatory mechanism (the "safe harbor") covering anything in that grey area that lets us confidentially consult with a small panel of ethical, legal, and technology experts before we launch. Technologists would provide transparency, and adherence to a set of ethical and technological design principles, and agreement to work constructively with the Bar on any complaints. I also like the requirement to work with a licensed attorney. In return, the Bar would provide some degree of certainty with respect to claims of Unauthorized Practice of Law, as well as explicit approval for Bar members to use it in their practice. Any time there is a significant deviation, new product, or some number of years has passed, I think it would be appropriate to repeat the process. I see no reason the panel should not be funded through user fees, avoiding the need to ask for state funding. Perhaps there could even be an offset if one serves as an expert on a certain number of panels, for those of us without massive amounts of venture capital. I am probably using this term incorrectly, as I am not a lawyer, but I envision this as a sort of consent-decree before a conflict occurs; a "proactive" consent-decree.

The one sticking point for me as a legal tech business owner is that I don't really want to provide to any 3rd party the full un-compiled source code, even one as trustworthy as the Bar. I'm not sure it would be that meaningful either; at Legal Robot we have 109,669 lines of code today, plus the many millions of lines of code from frameworks and packages we depend on. Even we have trouble getting it all to

conceptually fit together, much less actually work together, and we wrote it all. I feel like higher level artifacts like detailed architecture diagrams, process flows, a fully-functional demo, and a panel interview should provide sufficient information for experts to evaluate if a product likely poses a risk to the public. I'm also concerned that code moves very quickly (for example, I've done 47 git commits this weekend alone), so I'd suggest we include language about only significant changes requiring subsequent review.

I'm don't know that this is within our scope, but I also think we should discuss use of AI in the judiciary. An EU commission, the European Commission for the Efficiency of Justice (CEPEJ), just posted a report in December on this subject, many of their principles align with the ACM Principles on Algorithmic Transparency that I mentioned at our 12/5 meeting.

From: Dan Rubins
Date: January 7, 2019
Re: Artificial Intelligence

I have one more resource with some additional commentary for the AI subcommittee. I just remembered this article from Brad Smith, Microsoft's President and Chief Legal Officer that discusses many of the principles in an article about Facial Recognition: https://blogs.microsoft.com/on-the-issues/2018/12/06/facial-recognition-its-time-for-action/

TL;DR: a few principles in here with respect to our subcommittee:

1. Addressing bias and discrimination. "Certain uses of [AI] increase the risk of decisions, outcomes and experiences that are biased and even in violation of discrimination laws."
    1. Requiring transparency. Discussed at our last meeting, likely more discussions to follow.
    2. Enabling third-party testing and comparisons. I don't think we've covered this yet.
    3. Ensuring meaningful human review. Joyce's note to the group proposes licensed attorney on the team, and at our last meeting we discussed some kind of human review by experts.
    4. Avoiding use for unlawful discrimination. Perhaps we need to have an "evil" thought exercise to evaluate potential harms. Many tech companies, including mine, now do "red team" sprints like this to evaluate threat actors and misuse of technology.
2. Protecting people's privacy. "People deserve to know when this type of technology is being used, so they can ask questions and exercise some choice in the matter if they wish."
    1. Ensuring notice. This is not an area I had considered yet, but it bears thought whether lawyers should disclose when they are using algorithms to perform legal work.
    2. Clarifying consent. May not apply to all situations (i.e. risk algorithms for bail decisions) but I'd personally want to know if my lawyer is just farming my issue out to an algorithmic 3rd party.
3. Protecting democratic freedoms and human rights. "Democracy has always depended on the ability of people to assemble, to meet and talk with each other and even to discuss their views both in private and in public," particularly their lawyers.
    1. Limiting ongoing government surveillance of specified individuals. Aligns with the encryption discussion in my previous email.

Microsoft is adopting 6 principles:

1. Fairness
2. Transparency
3. Accountability
4. Non-discrimination
5. Notice and consent
6. Lawful surveillance

Compared to ACM's Principles for Algorithmic Transparency and Accountability, MS seems to be obviously missing Data Provenance and Auditability, but adds protections around Lawful Surveillance and uses a more consumer-centric view of Notice and Consent over ACM's Awareness principle that is targeted at makers. I think we can learn a lot from both.

From: Joyce Raby
Date: January 3, 2019
Re: Regulation of Law and Tech Companies

As I discussed during our meeting last month, I would like to suggest that the CA Bar create a regulatory "safe harbor" for law and/or tech companies that wish to create software tools that support self represented litigants or that support attorneys providing legal services. I am thinking primarily of document assembly tools, online portals that allow clients to purchase unbundled or limited scope services from attorneys, AI/machine learning driven system that provides legal guidance based on data analysis, and the like.

The safe harbor would consist of a set of rules which companies would need to comply with to receive CA Bar "approval". That approval would allow these companies to operate in California and would provide a mechanism of oversight between the Bar and the Company.

I suggest that the CA Bar charge an application and review fee sufficient to cover the cost of administering this program.

The rules would be along the lines of;

- the development of all software or automated systems would need to be reviewed and overseen by a licensed California attorney who would be responsible for certifying that all processes (algorithms, logic trees, decision making criteria) produce guidance that is legally accurate in CA.

Key points/review milestones (rather than have a Company create an entire system and then ask for approval - the Bar would be required to sign off on development at key stages; much like approvals for building construction).

- Step 1: Companies would submit an initial System Specifications document to CA Bar that would outline the overall functionality and feature set of the proposed software

- Step 2:

a. Companies would submit for review to the CA Bar an "alpha test" version of the software prior to any public launch (up to 6 months before the anticipated public launch)

b. Companies would submit for review to the CA Bar Data Privacy/Security policies and protocols that are compliant with current industry best practices

c. Companies would submit for review to the CA Bar the anticipated/envisioned complaint process. Each Company would be required to have a formal complaint process whereby a member of the public or attorney user can challenge information/guidance provided by the system.

d. Companies would need to submit for review to the CA Bar the process they will use to identify and rectify bias in the system

- Step 3: Company would submit for review a finalized version of the software one week before public launch

- that the Company undertake a good faith effort – which would be documented and maintained – to eliminate bias within the system from development through implementation and post launch.

- all outputs created by an automated system would need to create both hardcopy fillable documents as well as e-fillable documents. This means all documents would need to be compliant with local rules.

- all systems that create fillable documents would need to include the ability to create and file an indigent fee waiver

- perhaps we could strongly encourage that Companies creating such tools work with local clerk's offices, or court-based self help centers, or legal aid organizations to ensure that SRL's are not automatically precluded from using such tools?

That is my preliminary thinking - clearly more work needs to be done. I wanted to get this information distributed to the group early enough for everyone to have a chance to think before we meet again in a few weeks.